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SUPREME COURT, U.S.
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No. 340

In the Supreme Court of the United States

OCTOBER TERM, 1960

JOHN FACTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 540

JOHN FACTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 3a-53a) is reported at 281 F. 2d 100.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 20, 1960 (Pet. App. 3a). A timely motion for rehearing was denied on July 27, 1960. By order of Mr. Justice Douglas, dated October 21, 1960, the time for filing a petition for a writ of certiorari was extended to November 24, 1960. The petition was filed on November 23, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Taxpayer's petition to the Tax Court, as amended, alleged (so far as here pertinent) that he was entitled to income tax deductions for "various costs and expenses." As to this item, he made no further specification in any of his pleadings, although it appeared that some costs and expenses had already been allowed by the Commissioner. The question presented is whether, in this context, the Tax Court acted within its discretion in ruling that taxpayer was precluded by his failure to comply with Rule 7 of the Tax Court's Rules of Practice requiring clear and concise pleading of errors attributed to the Commissioner.

RULE INVOLVED

Rules of Practice before the Tax Court of the United States (Revised to November 15, 1952):

> Rule 7.—INITIATION OF A PROCEEDING—PETITION—FILING—FEE—FORM.
>
> * * * * * *
>
> (c) *Form of petition.*—
>
> * * * * *
>
> (4) The petition shall contain:
>
> * * * * * *
>
> (D) Clear and concise assignments of each and every error which the petitioner alleges to have been committed by the Commissioner in the determination of the deficiency. * * *

(c) Clear and concise numbered statements of the facts upon which the petitioner relies as sustaining the assignments of error * * *.

* * * * *

STATEMENT

For the years 1935, 1936 and 1937, the taxpayer failed to maintain any records of income received by him from two Canadian corporations. (R. 100.)[1] In the absence of taxpayer's records, the Commissioner determined which of the disbursements of the Canadian corporations constituted income to taxpayer, computed the taxes owed by the taxpayer and asserted deficiencies, including penalties for fraud with intent to evade tax (R. 82-83).

The taxpayer filed a petition in the Tax Court, contesting the deficiencies. Later, he amended his petition to allege error by the Commissioner in failing to allow him deductions for "various costs and expenses" (Pet. App. 56a), but at no stage did he file a pleading to specify what costs and expenses he claimed.

The Tax Court determined the amount of taxpayer's deficiencies and that taxpayer was liable for penalties for fraud for each year (R. 128). As to taxpayer's claim for "various costs and expenses," in addition to those allowed by the Commissioner, the Tax Court held that the amended petition was "* * * insufficient to present the issues as to deductions now claimed on brief." (R. 112.) The Tax Court held

[1] "R." refers to the three-volume Joint Appendix in the Court of Appeals.

that the pleading failed to comply with Rule 7 of the Rules of Practice of the Tax Court, which requires "clear and concise assignments of each and every error which the petitioner alleges to have been committed by the Commissioner * * *." Further, the Tax Court stated that, from the amendment to the petition, it was "impossible" to know the type of costs and expenses claimed or the amounts thereof (R. 111-112); and that the fact that the Commissioner had already allowed "various costs and expenses" served to point up the necessity for a definite pleading if the taxpayer claimed error for failure to allow additional costs and expenses (R. 112).

Taxpayer filed two appeals—one to the Ninth Circuit, involving the years 1935 and 1936, the other to the District of Columbia Circuit, involving the year 1937 (the year in which taxpayer failed to file any return). See Section 7482(b)(1), Internal Revenue Code of 1954. The Ninth Circuit affirmed the Tax Court decision without qualification. The District of Columbia Circuit also affirmed the Tax Court decision, except that it remanded the issue relating to "various costs and expenses" with directions to consider any such items as to which proof might be adduced. (Pet. App. 55a-56a.)

ARGUMENT

As was stated by the Commissioner in his protective petition for certiorari in the related case decided by the District of Columbia Circuit,[2] the Government

[2] *Commissioner of Internal Revenue v. John Factor (Sometimes Known as Jacob Factor)*, No. 524, this Term

believes that the question presented lacks sufficient general importance to merit review by this Court. At least ordinarily, the interpretation of a Tax Court rule of practice would seem to be a matter primarily for the Tax Court. Moreover, it seems clear that neither of the courts of appeals has undertaken to set forth a definitive interpretation of Tax Court Rule 7. In the instant case, the Ninth Circuit upheld the Tax Court's application of the rule because it was persuaded that the Tax Court had applied it in a reasonable manner and that the result could not properly be characterized as a miscarriage of justice (see Pet. App. 42a). In the companion case, the District of Columbia Circuit followed a different course and remanded so as to allow the offer of additional proofs. But since that court enunciated no general rule and cited no authority for its holding, it must be inferred that it too decided the matter on the basis of its evaluation of a particular set of facts. Decisions of such narrow compass and significance would not appear to warrant grant of the writ.

We point out additionally that the decision of the Ninth Circuit, although it adopts a stricter view of the case than that taken by the District of Columbia Circuit, certainly cannot be regarded as an arbitrary one. In the absence of any records kept by taxpayer as to his income from the Canadian corporations, the Commissioner was forced to reconstruct the taxpayer's income, and in so doing the Commissioner allowed many costs and expenses. The Tax Court was thus justified, we believe, in holding that taxpayer's vague pleading, that he was entitled to "various" additional

costs and expenses, was "insufficient to present the issues as to deductions now claimed on brief." (R. 112.) As the Tax Court put it (R. 111-112), the taxpayer's pleading made it

> * * * impossible to know the year or years for which such deductions were disallowed; it is impossible to know the type or types of "costs and expenses" claimed and it is impossible to know the amounts of such deductions claimed.

Since it appears on the face of it that taxpayer had failed to comply with the requirements of Rule 7 for "[c]lear and concise" assignments of each alleged error, the only question remaining is whether something less than compliance with the Rule will suffice. The Ninth Circuit was certainly warranted in deciding that, in the absence of a convincing showing of miscarriage of justice, it would not overturn a Tax Court decision giving effect to the Tax Court's settled and published rule of practice.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER, 1960.